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No. 10,065

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN KONG YEUNG,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

OPENING BRIEF OF JOHN KONG YEUNG.

PHILIP SILVER,
Honolulu, T. H.,
Counsel for Appellant,
John Kong Yeung.

CASS & SILVER,
101-103 Rice Building, 227 S. King Street, Honolulu, T. H.,
Of Counsel.

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JURISDICTION OF THIS COURT TO REVIEW THE JUDGMENT IN QUESTION.

This is an appeal from a Judgment of the United States District Court for the Territory of Hawaii in a criminal action based upon an indictment for murder in the second degree in violation of Sec. 5990, Revised Laws of Hawaii, 1935. The indictment was returned by the Grand Jury of the First Judicial Circuit, Territory of Hawaii on October 2, 1941 and may be found on pages 6-7 of the Record.

The Indictment was returned by the said Grand Jury under the authority of Sec. 5490, Revised Laws of Hawaii, 1935. It was originally reported to the Circuit Court of the First Judicial Circuit, Territory of Hawaii, which has jurisdiction of violations

of the criminal statutes of the Territory of Hawaii under Sec. 3643, Revised Laws of Hawaii, 1935.

On October 10, 1941 the Appellant filed a "Petition for Removal of Cause" (Record pp. 8-16) purportedly pursuant to 28 U.S.C.A. Sec. 76 at page 552. After subsequent proceedings, including the filing of an "Amended Petition for Removal of Cause" (Record pp. 24-48) the Public Prosecutor representing the Appellee "consented to the trial of this case" in the United States District Court for the Territory of Hawaii (Record p. 55). The Indictment was thereupon tried before a jury in the latter court purportedly under the authority of 28 U.S.C.A. Sec. 76 at page 552. A "Judgment and Commitment" was entered on the verdict of the jury finding the Appellant guilty of manslaughter, an offense included within that set forth in the Indictment (Record pp. 48-50).

The jurisdiction of this Court to review the said Judgment is based upon 28 U.S.C.A. 225 (a) Second at page 103 of 1941 Cumulative Annual Pocket Part which reads:

> "Appellate jurisdiction.
> (a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions——
> * * * * * *
> Second. In the United States District Courts for Hawaii and for Puerto Rico, in all cases."

The foregoing statute superseded 48 U.S.C.A. 645, Sec. 86, paragraph (d) of the Hawaii Organic Act,

which originally likewise allowed appeals from the District Court for the Territory of Hawaii to this Court in the same manner as appeals were then allowed from circuit courts to circuits courts of appeals. This Court thus has jurisdiction to review the Judgment of the United States District Court for the Territory of Hawaii for the purpose of ascertaining whether or not that court had jurisdiction to try the Indictment.

On March 17, 1941 the Supreme Court of the United States entered an order expressly extending the operation of the "Rules of criminal procedure after plea of guilty, verdict or finding of guilt" to appeals from the United States District Court for the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit in any case in which a verdict is rendered on and after July 1, 1941 (see note to Rule 13, 16 U.S.C.A. p. 150 of 1941 Cumulative Annual Pocket Part). These rules are set out at 18 U.S.C.A. Sec. 688 at page 131 of the 1941 Cumulative Annual Pocket Part). The present appeal was taken pursuant to Rule 8 of the said "Rules" being an appeal without bill of exceptions prosecuted upon the record of proceedings of the clerk of the United States District Court for the Territory of Hawaii. The Assignment of Errors (Record pp. 72-75) consists of nine errors, each and every one of which goes to the question of the jurisdiction of the lower court to try this indictment. The "Judgment and Commitment" was entered on December 1, 1941 (Record pp. 49-50). "Notice of Appeal" was filed

on December 5, 1941 pursuant to Rule 3. On December 12, 1941, the United States District Court for the Territory of Hawaii entered a general order continuing all matters and causes then pending before the court indefinitely (Record p. 50). That order was cancelled on February 10, 1942 (Record p. 52). The Assignment of Errors was filed with the clerk of the lower court by Appellant on February 26, 1942. On February 27, 1942 the lower court entered an Order directing the Chief Clerk thereof to forward promptly to this Court the record in the cause (Record pp. 77-78). The record was so forwarded and was docketed in this Court on March 14, 1942 as No. 10,065. The appeal has thus been perfected under Rule 8.

STATEMENT OF THE CASE.

This is an appeal from a judgment in a criminal case rendered by the United States District Court for the Territory of Hawaii. The defendant was indicted for the crime of murder in the second degree by the Grand Jury of the First Judicial Circuit for the Territory of Hawaii on October 2, 1941. Proceedings were taken by the Appellant to remove the cause for trial to the United States District Court for the Territory of Hawaii under the purported authority of 28 U.S.C.A. Sec. 76 at page 552.

After the filing of an "Amended Petition for Removal of Cause" the Public Prosecutor representing the Appellee consented to the removal of the cause

to the United States District Court for the Territory of Hawaii (Record p. 55). The latter court thereupon assumed jurisdiction of the indictment and the case was tried before a jury in that court, the trial resulting in a verdict of guilty of manslaughter. Whereupon a judgment and commitment were entered by the terms of which the Defendant was adjudged guilty of the offense of manslaughter, included within the offense set forth in the indictment, and was committed to imprisonment at hard labor in the Oahu Penitentiary for a maximum of ten years.

The case is now before this Court on an appeal taken under Rule 8 of the "Rules of Criminal procedure after plea of guilty, verdict or finding of guilt". It is thus an appeal without bill of exceptions prosecuted upon the clerk's records of proceedings.

The sole question involved in this appeal is whether or not the United States District Court for the Territory of Hawaii had jurisdiction to try this indictment. This question is raised by each and every one of the errors appearing in the "Assignment of Errors" (Record pp. 72-75). It appears from the record that this is the first time that the question of jurisdiction of the lower court has been raised in this case. In other words, the record reveals that at no time during the course of the proceedings in the court below was the question of jurisdiction presented to the Judge of the United States District Court for the Territory of Hawaii either for consideration or decision.

SPECIFICATION OF ERRORS RELIED UPON.

The following assigned errors are to be relied upon:

"ASSIGMENT OF ERROR No. I (Record p. 73). The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this cause for the reason that it had no jurisdiction over the Defendant.

ASSIGNMENT OF ERROR No. II (Record p. 73). The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this cause for the reason that it had no jurisdiction over the subject matter of the action.

ASSIGNMENT OF ERROR No. III (Record p. 73). The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this action for the reason that it is based upon an indictment returned by the Grand Jury of the First Judicial Circuit, Territory of Hawaii and the said Court was without jurisdiction to try said indictment.

ASSIGNMENT OF ERROR No. IV (Record pp. 73-74). The United States District Court for the Territory of Hawaii erred in assuming jurisdiction over this cause for the reason that it was not removable to said Court from the Circuit Court of the First Judicial Circuit, Territory of Hawaii, which is a Territorial court, under any rules or statutes of the United States made and provided therefor.

ASSIGNMENT OF ERROR No. V (Record p. 74). The United States District Court for the Territory of Hawaii erred in assuming jurisdiction over this cause for the reason that it involves an offense under the laws of the Territory of Hawaii which is not cognizable by the said Court.

ASSIGNMENT OF ERROR No. VI (Record p. 74). The United States District Court for the Territory of Hawaii was without jurisdiction to try the offense of murder in the second degree or any included offense under the laws of the Territory of Hawaii as set forth in the indictment herein.

ASSIGNMENT OF ERROR No. VII (Record p. 74). The United States District Court for the Territory of Hawaii is not a constitutional court of the United States and therefore there was no right of removal from the Circuit Court of the First Judicial Circuit, Territory of Hawaii to said Court.

ASSIGNMENT OF ERROR No. VIII (Record p. 74). The United States District Court for the Territory of Hawaii was without jurisdiction to enter a judgment and commitment in this cause.

ASSIGNMENT OF ERROR No. IX (Record p. 75). The United States District Court for the Territory of Hawaii had no original jurisdiction over this cause and the said case was therefore not removable to said Court."

ARGUMENT.

POINT 1.

THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII HAD NO ORIGINAL JURISDICTION TO TRY THIS INDICTMENT FOR THE CRIME OF MURDER IN THE SECOND DEGREE, BEING A VIOLATION OF SEC. 5990, REVISED LAWS OF HAWAII, 1935.

Assignment of Error No. I.

"The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this cause for the reason that it had no jurisdiction over the Defendant."

Assignment of Error No. II.

"The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this cause for the reason that it had no jurisdiction over the subject matter of the action."

Assignment of Error No. III.

"The United States District Court for the Territory of Hawaii erred in assuming jurisdiction of this action for the reason that it is based upon an indictment returned by the Grand Jury of the First Judicial Circuit, Territory of Hawaii and the said Court was without jurisdiction to try said indictment."

Assignment of Error No. IV.

"The United States District Court for the Territory of Hawaii erred in assuming jurisdiction over this cause for the reason that it was not removable to said Court from the Circuit Court of the First Judicial Circuit, Territory of Hawaii,

which is a Territorial court, under any rules or statutes of the United States made and provided therefor."

Assignment of Error No. VI.

"The United States District Court for the Territory of Hawaii was without jurisdiction to try the offense of murder in the second degree or any included offense under the laws of the Territory of Hawaii as set forth in the indictment herein."

The Appellant was indicted by the Grand Jury of the First Judicial Circuit, Territory of Hawaii, for the crime of murder in the second degree in violation of Sec. 5990, Revised Laws of Hawaii, 1935. This is an offense of which the United States District Court for the Territory of Hawaii (hereinafter referred to as District Court) has no power to take cognizance. The jurisdiction of the District Court is set out in 48 U.S.C.A. Sec. 642, at page 201. Its criminal jurisdiction is limited to the criminal jurisdiction of "District Courts of the United States". Such jurisdiction is set out in 28 U.S.C.A. Sec. 41 (2) at page 32 and 18 U.S.C.A. Sec. 546 at page 8. Violation of Sec. 5990, Revised Laws of Hawaii, 1935 is clearly not a crime or offense "cognizable under the authority of the United States" being purely and simply a violation of a law enacted by the legislature of the Territory of Hawaii. The Grand Jury empaneled by the United States District Court for the Territory of Hawaii could not have returned a verdict for violation of Sec. 5990, Revised Laws of

Hawaii, 1935 under any existing statute, rule of law or authority. Had it returned the indictment the District Court would have been obliged to dismiss it immediately for lack of jurisdiction.

As will be subsequently pointed out there is a basic and vital distinction between causes over which federal and state courts have concurrent jurisdiction and causes over which state courts alone have jurisdiction but which may be removed to the federal courts under the authority of a statute expressly authorizing such procedure. The present indictment clearly falls within the latter category. The District Court had no original jurisdiction over the Defendant or the offense charged. If there was any right in any one to remove the cause from the Circuit Court of the First Judicial Circuit to the District Court and if the District Court had the power and authority to try the indictment after such removal, clear and express statutory authorization therefor must be found to exist somewhere.

POINT 2.

THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF HAWAII HAD NO JURISDICTION TO TRY THIS INDICTMENT FOR THE CRIME OF MURDER IN THE SECOND DEGREE BEING A VIOLATION OF SEC. 5990, REVISED LAWS OF HAWAII, 1935, ON REMOVAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII.

"Assignment of Error No. V.

"The United States District Court for the Territory of Hawaii erred in assuming jurisdiction over this cause for the reason that it involves

an offense under the laws of the Territory of Hawaii which is not cognizable by the said Court."

Assignment of Error No. VII.

"The United States District Court for the Territory of Hawaii is not a constitutional court of the United States and therefore there was no right of removal from the Circuit Court of the First Judicial Circuit, Territory of Hawaii to said Court."

Assignment of Error No. VIII.

"The United States District Court for the Territory of Hawaii was without jurisdiction to enter a judgment and commitment in this cause."

Assignment of Error No. IX.

"The United States District Court for the Territory of Hawaii had no original jurisdiction over this cause and the said case was therefore not removable to said Court."

The cause was purportedly removed from the Circuit Court of the First Judicial Circuit, Territory of Hawaii to the District Court under the authority of 28 U.S.C.A. Sec. 76 at page 552 which reads in part as follows:

"S 76. (Judicial Code, section 33, amended.) Same; suits and prosecutions against revenue officers. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority

> of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, * * * the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: * * *"

An excellent discussion of the historical function and purpose of the statute may be found in the case of *Tenn. v. Davis,* 100 U.S. 257, 25 L. Ed. 648. In that case Mr. Justice Strong pointed out that this removal statute, a restriction upon state sovereignty, is valid and constitutional and in fact essential to the very existence of the Federal Government.

> "* * * If, when thus acting, and within the scope of their authority, those officers can be arrested, and brought to trial in a State Court, for an alleged offense against the law of the State, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere at once for their protection; if their protection must be left to the action of the State Court; the operations of the General Government may at any time be arrested at the will of one

> of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The State Court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States Court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested."
>
> *Tenn. v. Davis,* 100 U.S. 257, 263, 25 L. Ed. 648, 650.

There is simply no logic or reasoning by which the word "State" as used in the statute can be twisted or distorted to include "Territory." And Mr. Justice Strong's opinion makes it abundantly clear that there is no historical reason or justification for any such distortion. The statute was never intended to authorize or effectuate removals from one court appointed by and under control of the President and Congress of the United States as are the Circuit Courts of the Territory of Hawaii to another court appointed and controlled in exactly the same fashion. The Circuit Courts of the Territory of Hawaii were created and are controlled by Congress (48 U.S.C.A. Sec. 631 at p. 197).

This statute is more than merely a procedural statute. Such removal statutes as 28 U.S.C.A. Sec. 71

at page 3 are purely procedural statutes because the causes therein described as removable from state courts to federal courts are causes over which both sets of courts had original jurisdiction. In other words, that statute merely gives the Defendant the right to remove the cause to a Court in which it might have been instituted in the first place with complete propriety. That is not at all true with reference to the present statute, which covers causes over which the Federal courts have no original jurisdiction but in which they are able to act solely by reason of the existence of the removal statute. Since the statute thus confers jurisdiction where none previously existed it is doubly important that its terms be carefully scrutinized and that it be not so construed as to stretch the jurisdiction created.

The very question we are now considering was submitted to the Attorney General of the United States by the Department of Justice on August 9, 1871. A lucid and unanswerable opinion was rendered on August 28 of the same year. 13 Opinions of the Attorney General 584. It is interesting to note that the reasoning of the Attorney General revolves largely around the proposition that to so construe the statute as to entitle a litigant to transfer a cause from one court "created by the United States laws, presided over by a judge appointed by the President of the United States, and all the proceedings in which are regulated by the acts of Congress establishing a territory" to another court identically so constituted would rob the statute of any bene-

ficial or desirable effect and would in fact defeat its purpose.

From the earliest times the Supreme Court of the United States has held that where the word "State" is used in a statute it will not be construed to include "Territory" unless some special or pressing reason exists therefor.

U. S. v. Wynne, 217 U.S. 244, 54 L. Ed. 748;
New Orleans v. Winter, 1 Wheat. 91, 4 L. Ed. 44;
Mansfield etc. R. Co. v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L. Ed. 462;
Cameron v. Hodges, 127 U.S. 322, 8 S.Ct. 1154, 32 L. Ed. 132;
Southern Kansas R. Co. v. Briscoe, 144 U.S. 133, 12 S. Ct. 538, 36 L. Ed. 377.

We thus have no hesitation in asserting flatly that so far as 28 U.S.C.A. Sec. 76 goes, it contains no basis or authority in logic or history for the removal of a cause from the Circuit Court of the First Judicial Circuit, Territory of Hawaii to the United States District Court for the Territory of Hawaii.

We anticipate that the Appellee will take the position that 48 U.S.C.A. Sec. 645 at page 203 creates a right and power of removal from one territorial court to another because the phrase "removal of causes" appears therein. It reads in full:

> "S 645. Writs of error and appeal. Writs of error and appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same

> manner as writs of error and appeals are allowed from district courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

We regret the necessity of burdening this brief with an anticipatory argument but we feel we are justified in so doing in this case because the only shadow of a basis for defending the District Court's jurisdiction is to be found in this statute.

> "7. In General.—In dealing with statutes intended to affect or claimed to affect the continuance of jurisdiction in courts of original and general authority the law has always recognized a principle of construction which served to favor the retention of jurisdiction. * * * And in the United States, the authorities are very numerous and striking that before it can be claimed that an act is to have the effect of absolutely divesting a jurisdiction which has regularly and fully vested, the law in favor of it must be clear and unambiguous. * * * There is abundant reason to favor the application of this principle to removal acts of Congress, * * *"
>
> 23 *R. C. L.* 605.

In addition to the foregoing rule of construction there are a number of conclusive reasons why 48

U.S.C.A. Sec. 645 does not authorize removal from one territorial court to another as follows:

(1) 48 U.S.C.A. 645 HAS BEEN REPEALED BY IMPLICATION.

Between 1900 when the statute was first enacted and 1911, the only statutory basis for an appeal from the Supreme Court of the Territory of Hawaii to the Mainland United States Courts was to be found in this section of the Hawaii Organic Act. The Supreme Court of the United States held in a number of well considered cases that appeals and writs of errors were thereby provided to and from the United States Supreme Court in exactly the same manner as were provided by other statutes to and from the highest courts in the several states and were likewise limited in scope to federal questions.

Ex Parte Wilder's Steamship Company, 183 U.S. 545, 46 L. Ed. 321;

Equitable Life Assurance Soc. of U.S. v. Brown, 187 U.S. 308, 47 L. Ed. 190.

By amendment (act of March 3, 1905, Chap. 1465, Sec. 3; 33 Stat. at L. 1035) the appellate jurisdiction of the United States Supreme Court was enlarged to include "all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars."

Harrison v. Magoon, 205 U.S. 501, 51 L. Ed. 900;

Notley v. Brown, 208 U.S. 429, 52 L. Ed. 559;

Bierce v. Waterhouse, 219 U.S. 320, 55 L. Ed. 237;

Spreckels v. Brown, 212 U.S. 208, 53 L. Ed. 476;

Honolulu Rapid Transit Co. v. Wilder, 211 U.S. 144, 53 L. Ed. 124.

Then in 1911 by Sec. 246 of the Judicial Code of March 3, 1911, Chap. 231, 36 Stat. at L. 1087 it was provided that writs of error and appeals from the final judgments and decrees of the Supreme Court of Hawaii may be taken to the Supreme Court of the United States.

> "in the same manner, under the same regulations, and in the same classes of cases, in which" they may be taken from the final judgments and decrees of the court of a state, "and also in all cases wherein the amount involved, exclusive of costs, * * * exceeds the sum or value of five thousand dollars."

This statute completely superseded 48 U.S.C.A. 645 so far as writs of error and appeals from the Supreme Court of the Territory of Hawaii were concerned.

Hapai v. Brown, 239 U.S. 502, 60 L. Ed. 407.

In 1915 the statute was further amended and for the first time appeals were allowed from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit (Act of Jan. 28, 1915, 38 Stat. at L. 803, Chap. 22).

Inter-Island Steam Navigation Co. v. Ward, 242 U.S. 1, 61 L. Ed. 113.

Finally in 1925 exclusive appellate jurisdiction over judgments and decrees of the Supreme Court of the Territory of Hawaii was vested in the Circuit Courts

of Appeals by 28 U.S.C.A. 225 at page 294 which reads in part as follows:

> "(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions * * *"
>
> * * * * * * *
>
> "Fourth. In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000, and in all habeas corpus proceedings."

What then has happened to 48 U.S.C.A. 645? The first sentence thereof is covered by paragraph "Second" of 28 U.S.C.A. 225. And the second sentence as construed by the United States Supreme Court in the cases above cited has been completely eradicated by the procedure established by 28 U.S.C.A. 225. The two statutes cannot stand together since the earlier creates a right of appeal directly to the United States Supreme Court and the latter creates a right of appeal to this Court exclusively. Can there be any doubt that the right of appeal from the Supreme Court of the Territory of Hawaii to the United States Supreme Court no longer exists? That being so, there is nothing left of the second sentence of 48 U.S.C.A. 645. Sec. 246 of the Judicial Code has of course been repealed, leaving nothing of the old procedure. 28 U.S.C.A. 225 has taken its place completely. A careful recodification, taking into consideration repeals

by implication, would require the complete removal of 48 U.S.C.A. 645 and particularly the second sentence thereof from the statute books.

Assuming that which we expressly deny, to wit, that 48 U.S.C.A. 645 is in effect and still on the books, it clearly did not confer jurisdiction on the District Court in the present case for the following additional reasons.

(2) THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII IS NOT ONE OF THE "COURTS OF THE UNITED STATES".

This question was squarely raised and settled in the case of *United States v. Mookini,* 303 U.S. 201, 82 L. Ed. 746. In that case it was held that notwithstanding that the United States District Court for the Territory of Hawaii has been vested with jurisdiction similar to that of the "District Courts of the United States", that fact does not make it a "District Court of the United States". See also *United States v. Burroughs,* 289 U.S. 159, 163, 77 L. Ed. 1096, 1098; *O'Donaghue v. United States,* 289 U.S. 516, 77 L. Ed. 1356, 1363. It will be noted that the United States District Court for the Territory of Hawaii is referred to in the *Mookini* case and clearly designated as a "territorial court" or "legislative court" which is precisely what it is. It was created by an act of Congress just as the Circuit Courts and Supreme Court of the Territory of Hawaii were created by act of Congress. Its judges do not hold office for life but only for periods of six years. (48 U.S.C.A. Sec. 643 at page 202.) It is clearly thus not even a constitu-

tional court. We urge that the term "courts of the United States" as used in the statute was used in its "historic significance" to include only constitutional courts. Surely the use of the phrase twice in the second sentence of the statute permits of no other construction.

(3) 48 U.S.C.A. SEC. 645 IS BY ITS TITLE AND SUBJECT MATTER AN "APPEAL" STATUTE.

The statute was originally entitled "Writs of Error and Appeal". Writs of error were subsequently abolished so that its title at the present time is simply "Appeal". In one sense, the basic concept of an appeal is altogether different from the doctrine of removal of causes as between state courts and federal courts but in another sense an appeal is in the nature of a removal from one court to another. Surely writs of error and habeas corpus are removals in the general sense of the word. It is most unlikely that there was a legislative intent to confuse separate and distinct procedures and merge them in one statute. Such an intent clearly does not appear from the wording of the statute itself. Thus the conclusion is inescapable that "removal of causes" is used in the statute in its general sense of removal by appeal or writ.

(4) 48 U.S.C.A. 645 REGULATES THE APPELLATE RELATIONS BETWEEN THE "COURTS OF THE TERRITORY OF HAWAII" AND THE "COURTS OF THE UNITED STATES", NOT BETWEEN ONE COURT OF THE TERRITORY OF HAWAII AND ANOTHER.

"Courts of the United States" is used twice in the second sentence of the statute. The phrase obviously has the same meaning in both places as including the

Mainland federal courts, the United States Circuit Courts of Appeals and the Supreme Court of the United States. How else are we to construe the phrase "as between the courts of the United States and the courts of the several states". The phrase "as between the courts of the United States and the courts of the Territory of Hawaii" can mean nothing other than the relations between the Circuit Court of Appeals and the United States Supreme Court on the one hand and the Supreme Court of the Territory of Hawaii on the other.

Had Congress intended to create the right of removal from the Circuit Courts of the Territory of Hawaii to the United States District Court for the Territory of Hawaii it would undoubtedly have so clearly expressed itself by making the concluding phrase "as between the Courts of the Territory of Hawaii and the said District Court" as was done in the governing act of Porto Rico. But it was not regulating the relations between various Territorial courts. What it was doing was creating a procedure for appeal from the Supreme Court of Hawaii to the United States Supreme Court.

The Court's attention is respectfully invited to the significant distinction between the language of 48 U.S.C.A. 645 and the comparable section of the Foraker Act which is the act of Congress governing Porto Rico, to wit, 48 U.S.C.A. 864, at page 275. The concluding phrase of the first sentence in the latter statute "as between the district court of the United States and the courts of Porto Rico" shows a clear

intent to regulate the relations between the local Territorial courts and the District Court. No such language appears nor can any such intent be inferred from the wording of our statute.

In the case of *Garrozi v. Dastas,* 204 U.S. 64, 51 L. Ed. 369, it was held that even if an irregularity in the removal procedure is conceded to exist, nevertheless such irregularity is immaterial if the District Court had original jurisdiction of the parties and the subject matter of the action.

To the same effect see *Mackay v. Uinta Development Co.,* 229 U. S. 173, 57 L. Ed. 1138; *Arizona & N. M. Rwy. Co. v. Clark,* 235 U.S. 669, 59 L. Ed. 415.

From the Appellee's standpoint, the difficulty in the present case lies in the fact that the District Court had no original jurisdiction whatever over either the Appellant or the offense charged. Thus its lack of jurisdiction could not be cured by waiver, consent or any other action whatever on the part of the parties.

(5) THE PHRASE "REMOVAL OF CAUSES" IS USED THEREIN IN ITS GENERAL SENSE OF TRANSFER FROM ONE COURT TO ANOTHER BY APPEAL OR WRIT.

It is our contention that 48 U.S.C.A. Sec. 645 means nothing more or less than that the laws relating to appeals as between the state courts and the Mainland Federal Courts are applicable to appeals from the Supreme Court of the Territory of Hawaii to the Ninth Circuit Court of Appeals and the Supreme Court of the United States ("courts of the United States"). The phrase "removal of causes" as it ap-

pears therein is used in its general signification as removal from one court to another by means of writ of error or any other writ. It should be borne in mind that when the statute was first enacted writs of error were available. In a sense, a writ of error or an appeal, is a means of removing a cause from one court to another.

The phrase "removal of causes" has been variously used to signify change of venue.

Vickery v. Worford, 24 S.W. 764, 765, 119 Mo. 275;

State v. Reid, 18 N. C. 577, 28 Am. Dec. 572,

and removal from one state court to another court

Phillips v. Phillips, 186 Ala. 545, 65 So. 49;

Felts v. Delaware L. & W. R. Co., 45 A. 493, 494, 195 Pa. 21.

It is clear that in this statute the phrase is used in its general sense. Black's Law Dictionary, Second Edition, defines "removal of causes" primarily as meaning "the transfer of a cause from one court to another". And that must have been precisely what Congress intended in saying "as between the courts of the United States and the courts of the Territory of Hawaii", all within the framework of the title and subject of the statute, "Appeal".

(6) 28 U.S.C.A. SEC. 76 IS A SUBSTANTIVE CRIMINAL STATUTE WHICH SHOULD NOT BE EXTENDED BY IMPLICATION.

As already mentioned 28 U.S.C.A. Sec. 76 is substantive in the sense that it confers criminal jurisdiction on Federal courts where none previously

existed. Such criminal jurisdiction should not be extended by implication, which would result if 48 U.S.C.A. Sec. 645 were so construed as to grant the right of removal from the Circuit Courts of the Territory of Hawaii to the United States District Court for the Territory of Hawaii.

Anticipating that the Appellee will point to 48 U.S.C.A. 645 as justifying the District Court's jurisdiction in the present case, we urge that assuming this statute is still in existence, it in no way alters or affects 28 U.S.C.A. 76 and certainly does not enlarge the criminal jurisdiction of our District Court but merely creates the framework of appeal to the "Courts of the United States", to wit, the Supreme Court of the United States, which has been altered by later statutes. If the Appellee does not rely on 48 U.S.C.A. 645, then there is not even the shadow of a basis for arguing that the lower court had jurisdiction to try the present indictment.

We are aware of no logical basis for construing this statute so as to authorize removal of criminal cases from the Circuit Courts of Hawaii to the District Court, both sets of courts controlled by the President and Congress of the United States. If any such exists, we must ask counsel for the Appellee to clearly state it in their Answering Brief herein. We must also ask counsel how 48 U.S.C.A. 645 can be reconciled with 28 U.S.C.A. 225 and how the two conflicting procedures contemplated therein can exist side by side.

We take it that the proposition that jurisdiction cannot be conferred upon a court by consent or stipulation of the parties is so well settled in our system of jurisprudence that nothing more is required than a bare reference to the authorities.

14 *Am. Jur.* 380 (large collection of Federal and State cases in footnote No. 13).

CONCLUSION.

The Appellant was tried before the United States District Court for the Territory of Hawaii under an indictment of which the said court had no power or jurisdiction to take cognizance. For the foregoing reasons all proceedings in the District Court should be set aside.

Honolulu, Territory of Hawaii,
May 1, 1942.

CASS & SILVER,
By PHILIP SILVER.
Counsel for Appellant,
John Kong Yeung.